

PROFESSIONAL AUTONOMY OF THE TEACHER OR THE LAW

Summary: Ethics is the key dimension of education practices. Ethics includes justice, that is, it determines how teacher and pupil act within the agreed rules. For the ethical position of the teacher, however, it is not only crucial that he/she can demonstrate a legal argument to the pupil. From the point of view of the pupil, what he/she thinks about the teacher's actions, and what he/she believes to be the truth, is essential. The professional autonomy of teachers to act according to their own judgement is a cornerstone of pedagogics, but this autonomy is never absolute and cannot be guaranteed with legal instruments alone. When considering the behaviour of teachers, it is always possible to determine erroneous judgement or abuse.

Suppose lawyers tried to help education by attempting to eliminate the „excessive” interference of law and strictly procedural requirements in pedagogical practices. Would they need to invent a special law that determined when to apply special procedural rules and when to apply general ones? In our opinion, an additional law would be incapable of solving the problem between ethics and legality, because it would only introduce a further legal regulation. On the other hand, parents always have the possibility of coming to school with a lawyer and, through threats or the actual introduction of a lawyer (procedural requirements), intervening in the pedagogical process.

The solution does not, therefore, lie in introducing an additional legal regulation. The school, within the institution itself, has to agree on the norms and rules for which it stands, and it should arrive at these norms and rules through discussion with pupils and parents. However, if there is a conflict where a lawyer represents a pupil and his/her parents, engaging a lawyer is also essential on the part of the school.

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1 Janez.vogrinc@pef.uni-lj.si

2 Janez.vogrinc@pef.uni-lj.si

1. Introduction

Fundamental changes occurred in the relationship between the rights (with the complementary responsibilities) of the pupil in school and ensuring these rights *through procedural rules* that are legally guaranteed by the state school and the state when Slovenia underwent the transition from a socialist single-party system to forms of state organisation based, at least formally, on respecting human rights and the principles (and process procedures) of the legal state. This is certainly the case for the Republic of Slovenia from 1991 on. In the constitution, it is written that Slovenia is a legal state. The state has an obligation, also written in school legislation, to ensure all pupils equal educational opportunities. In this context, alongside equal rights, the principle of respecting the legal state gains additional meaning in kindergartens and schools.

It is true that ensuring educational rights in the state school system is in fact also dependent on the resources provided by the state, which each year determines which and how many rights will be ensured. The level of educational rights ensured to all children increases or decreases through the provisions of school legislation and through decisions linked with the state budget.

For pupils, however, there is a second, more tangible, level of ensuring educational rights: the ensuring of the specific rights of

the individual child or pupil in school during lessons and during other activities associated with school. From a legal point of view, the pupil in school has particular rights derived from legislation and regulations, and nowhere in Slovenian school legislation is it explicitly stated that a professional worker, kindergarten or school, can *temporarily deprive* a child or pupil of one or more educational rights. In reality, however, this constantly occurs in the pedagogical process; of course, not in such a way that the teacher legally deprives a pupil of a particular right during the lesson or as part of a formalised moral education measure, but rather in the sense that something essential or optimal is *de facto* not ensured or is ensured to a lesser extent. It is enough for one pupil to fail to respect his/her responsibility towards the others for it to become impossible for the lesson to be executed as planned, and the quality of instruction departs from an optimal level to an unacceptable extent.

The reasons for the greater or lesser quality of instruction are numerous and complex. There is no doubt, however, that when a particular pupil fails to meet his/her responsibilities the reasons cannot be entirely attributed to the pupil, as it is the school and the teacher who are fundamentally responsible for the execution of instruction. Numerous studies have demonstrated that the quality of the work of the teacher is decisive for the quality of education. However, if the teacher does

not establish the moral education dimension of the educational process, if he/she fails to establish authority and gain the attention of the pupils, the educational process itself collapses. Ever since the child's educational rights have been emphasised in society, we have adopted an understanding that each individual right is (or should be) absolute. When we add to this the demand of respecting the principles of the legal state, it appears that the „form of the law” has interfered in the moral education dimension in such a way that it undermines the pedagogical process itself. *But does it really?*

2. The primary dimension of an act is ethical, also in education

The introduction of respecting the concept of the legal state really did bring about a change, resulting in a new phenomenon appearing at schools with which it is necessary to engage: as the guardians of their children's rights, parents can come to school with a lawyer. But has this fact changed the nature of the pedagogical process? Certainly not. The pedagogical process as such has remained the same. In moral education as well, it is the specific *attitude* and *behaviours* of those involved that remain the key factors in the relationship between the teacher and the pupil. According to Kant, ethics is a „practical philosophy”, it deals with acts or behaviours. The reverse is also true: because the educational process is

practical, as it is a constant series of acts, the pedagogical process is above all ethical. Pupils therefore primarily judge and evaluate the teacher's behaviours ethically, that is, from the perspective of the values, norms and other possible judgement criteria previously mediated to them by parents and teachers. It should be added that, as pupils get older, their ability to independently establish criteria and evaluate – their power of judgement – increases.

In this process, one aspect of the teacher's behaviours, and thus of the evaluation of the teacher on the part of the pupil, is, of course, the educational process itself, the (didactic) quality of the process of mediating knowledge. In this regard, the pupils judge the teacher as a subject of knowledge, with the question: *Does he/she possess knowledge or not?* The second aspect of the same process is always the moral education dimension, with regard to which importance is placed on the ethicalness of the teacher's behaviours in the narrow sense, that is, whether or not the teacher is just. What is „justice” for the pupil? What is just in his/her eyes? The pupil judges this according to the values and norms that have been mediated by his/her parents, and later also by teachers. With age, this is built upon by the pupil's interests, the goals that he/she establishes and that build the structure of his/her desire (Krek, 2014). These criteria of ethicalness, even viewed from the position of a single pupil, can undoubtedly be rath-

er complex. In general, the individual teacher can neither entirely establish nor „control” these criteria, as the influence of parents in these processes is typically more important than that of the teacher. Irrespective of the fact that, as the pupil grows up, he/she becomes more independent in making ethical judgements, it is crucial for the pedagogical process that adults are aware that it is they – through what they say, how they establish limits and how they behave – who form the field of the ethical in the child, thus also establishing the frameworks of the pedagogical process.

In the structure of hierarchical power relationships, parents and teachers are in the position of establishing the criteria of ethicalness and justice in the child. This power of establishing the symbolic world *in the child*, thus also in the pupil as an ethical being, is a power from which is also drawn the power of the pedagogical process, which is prior to any kind of power of the law. The teacher proves that he/she has mastered the pedagogical process and is a good pedagogue through his/her relationship to the pupil, as demonstrated through concrete behaviours with which the teacher builds respect and an ethical „image” in the eyes of the pupil. The first source of the power of parents and teachers in school is, of course, derived from the well known fact established (to a large extent by the pupil’s own judgement) by the symbolic frameworks into

which the pupil enters in school. The second source of the power (or impotence) of the teacher in the pedagogical process is the attitude demonstrated by his/her behaviours. This source of the teacher’s power is therefore derived from the *realisation* of the delineated frameworks, it is „practical”, and therefore fundamentally ethical.

In other words, parents and teachers are objectively in the position of forming the criteria according to which the pupil judges the pedagogical process. On the one hand, there are important criteria establishing the appropriate standard of knowledge, while, on the other hand, there are criteria established by the school and the teacher in the area of moral education. The teacher first establishes the rules – possibly in dialogue with the pupils – which then become the criteria for judging the teacher’s own *behaviours*. If the teacher does this, and if he/she behaves within the agreed rules, from the perspective of the pupil it is not of primary importance whether or not the teacher can *legally* demonstrate that his/her behaviour is appropriate. From the perspective of the pupil and his/her judgement, the key thing is whether the teacher, in a particular act, has behaved justly or ethically according to the established criteria. Of primary importance is the pupil’s understanding of the teacher’s behaviour: what the pupil thinks about the teacher’s act, what he/she believes in, and what is true according to his/her

own judgement. It is necessary to be aware of this fact and not conceal it. The school and teachers have the power not only to influence the execution of the pedagogical process, but also to influence the criteria of the judgement of this process. They therefore also influence whether or in what cases the pupil and his/her parents will solicit help in ensuring the pupil's rights (or „justice”) in the field of power brought by legal procedures.

The conclusion is, therefore, as follows: the only consequence of the possibility of parents, in order to ensure the rights of their child, coming to school with a lawyer, whose main support is above all formally determined rights and procedural rules, is that it has become more important how the school oversees the pedagogical process as such by being attentive to its quality preparation and execution, that is, by focusing on that which is in any case the school's fundamental task.

In Slovenia, parents seek to protect their children to a greater extent than ever before, and with increasing frequency place themselves in the role of knowing better than the teacher how to behave as a pedagogue. An undesirable result of this is that teachers begin to give in to this pressure and adapt their work in advance so as not to be confronted with the demands and appeals of parents, a phenomenon most likely leading to a reduction in the quality of knowledge. On the other hand, parents are very important for the

achievement of the educational goals of the school. The school must encourage parents to support it in striving to achieve its goals; not least, as we have emphasised above, because in so doing it operates preventively. It must try to prevent the situation where parents come to school with a lawyer in an attempt to blackmail the school into upholding their child's rights (Cerar, 2011). It is therefore important for teachers and parents to discuss goals, measures and working methods, and for teachers to present their expectations and to cooperate with parents.

It is nonetheless necessary to be aware that the real possibility of conflict arising always exists. On the one hand, the teacher must, when it comes to moral education, have the professional autonomy and the opportunity to behave according to his/her own judgement of the state of affairs. On the other hand, this autonomy cannot be absolute, and there would be no sense in ensuring it legally, such as with a provision in the relevant legislation, as this would mean implementing a law stating that the teacher is absolutely right in each and every case.

The fact is that erroneous judgement and abuse can always arise on the part of the teacher as well, even in the case of judging something that is, under normal circumstances, a matter *purely of the teacher's professional judgement and behaviours* (Goodson & Hargreaves, 1996).

3. The collision of rights and moral education

The solution to the opposition between education and the law can certainly not be found in failing to take seriously the contradiction between respecting rights and any kind of infringement or abuse of these rights (Arum, 2003) (Dunn, Joshua M.; West, 2009).

It must, however, be acknowledged that teaching is a complex task. In the school context, the infringement or abuse of rights and responsibilities can arise on the part of all of those involved: pupils, teachers, the school and, not least, parents. Absolutising the rights of a particular pupil can come into conflict with the responsibilities that the school and the pupil in question have towards the rights of others. Infringing the responsibilities that an individual has towards the equal rights of everyone threatens the rights of other pupils, as well as the realisation of some other right of the individual him/herself.

Some years ago, for instance, there was public debate on the question of whether or not it would be just – or even legally possible – for a school to temporarily revoke the right of a particular pupil to receive school meals in the case that the pupil abused this right by wasting food, throwing it at other pupils, etc., both in order to protect the same rights of other pupils and as a means of implementing a moral education measure with regard to the

pupil who has abused his/her right. Is it acceptable to, in the name of moral education, act in such a way as to temporarily deprive someone of a right?

In the end, the contradiction is between a right (or, expressed more generally, the right to justice) and the necessity of moral education, which is the responsibility of the teacher and of the school in general as an institution. There are two problems: (1) whether it is possible to limit a right in the school system and, if so, how, and (2) how to resolve a dispute in the case that the limiting of a right is possible and when the limiting of a right arises.

3.1. The insolvability of the contradiction between justice and moral education in the present regulation of the school system

Since the passing of the school legislation in 1996, the problem of the contradiction described above between the principles of the legal state – between the right to justice, on the one hand, and the necessity of moral education, on the other – has not been satisfactorily resolved. The school legislation assigns the pupil particular rights, and a system of protecting these legally determined rights is established through school inspection. The basic goal of the operation and jurisdiction of school inspection is to protect the legal regulation, that is, to determine infringements of the law and of regulations in order to protect rights. The judicial system also functions as an

upgrading of appellate instances of the ministry and school inspection.³ Due to the possibility of an appeal by parents/pupil against procedures and measures, schools are often in the position of not knowing whether their conduct is justified, and whether an appellate instance will uphold the appeal of the parents/pupil.

In the school context, the teacher and school must operate in a way that supports moral education (Wringe, 2006). However, the potential recourse to legal means removes from the teacher and the school their authority and the possibility of implementing measures according to their best professional judgement, as there arises a constant necessity to consider whether the measure will withstand an appeal. In the case of temporarily revoking a pupil's right as a moral education measure, doubt also surrounds the moral education behaviour due to an entirely contrary logic: the teacher knows that, in the case of an appeal, the school inspection will certainly determine that the right of the pupil was in fact infringed, because, according

3 „This law regulates the organisation, the area of supervision and the jurisdiction of school inspection in order to ensure the respecting of legality and thus the protection of the rights of preschool children, primary school pupils, secondary school pupils, students, apprentices and participants in adult education” (*Zakon o šolski inšpekciji – ZSolI*, 1996, Article 1, cf. also Article 2).

to the law, the school inspection only has the authority to judge whether or not the law has been respected. In the case that the teacher/school implements a moral education measure by limiting or temporarily revoking a particular right of the pupil (such as the right to free lunch), the inspector has no choice but to determine that the right has been revoked. By definition, the inspector is not permitted to judge the reason for the right being revoked, as he/she has no legal basis to do so.⁴

In the case that, in order to protect some other right or responsibility, the teacher/school acts in such a way as to temporarily limit or revoke a particular right of the pupil, an additional complication is that this judg-

4 In Articles 7 and 8, the School Inspection Act does foresee the submission of evidence by an expert witness; however, the expert witness, too, is only able to provide a judgment within the frameworks of the basic goal of the law, that is, a judgment of legality. In principle, the expert witness could judge that, in the case of temporarily revoking a right, the school did in fact behave justly, but the witness would still be obliged to determine that the school had revoked the pupil's right. Due to the fact that the temporary limiting or revoking of rights is not legally regulated – on the contrary, the purpose of school inspection lies precisely in protecting rights – a decision by the school inspection to give priority to moral education behaviour (which includes the temporary revoking of a right) rather than to the absolute protection of the established rights of the pupil would be in contradiction with the entire logic of the operation of school inspection.

ment necessarily also includes a professional judgement of the justification of the moral education measure (which as one of its elements includes the temporary limiting/revoking of a particular right). Thus, on the one hand, we have a judgement of the justification of upholding a particular right, while, on the other hand, we have a judgement of the justification of a particular moral education measure, which, by definition, is a specific professional judgment in the domain of education professions.

The entire system is therefore caught in a kind of vice of two logics of operation: on the one hand, legality and the protection of the rights of the individual, and, on the other hand, professional and moral education behaviours. By definition, these two logics of operation never meet systemically, despite the fact that, in the reality of the behaviours of teachers and schools, they are not separated, and in reality they cannot be separated.

On the one hand, teachers and schools have an extraordinary degree of autonomy in their moral education activity – and in the worst cases can be very non-transparent when something happens – while, on the other hand, appellate instances only judge the legality of behaviours, and not their justification in terms of moral education.

Teachers (can) therefore place overly strict limits on themselves and fail to oper-

ate in a way that supports moral education (or even operate in a way that is contrary to moral education) because they know that the protection of certain rights of the pupil are *formally* not established relative to other rights and relative to the responsibilities of the pupil. The inadequately considered concept of justice in school education thus places justice beyond moral education behaviours. In cases where the temporary revoking of a particular right is necessary in order to achieve the goals of moral education and/or to protect the rights of others, it is not possible to do so. This is why, in the new *White Paper on Education in the Republic of Slovenia* (2011), we suggested modifying school legislation to allow schools to temporarily revoke of a particular right of a pupil as part of a moral education measure:

This is also due to the supposition that it is not possible to revoke an individual right, and that the right is in this sense absolute, that on the level of the realisation of individual rights and responsibilities contradictions between them unavoidably arise, as does the necessity for teachers and schools to make decisions as to how the rights and responsibilities of pupils and teachers can be best realised in specific contexts – amongst other reasons, in order for the teachers and schools to be able to fulfil their obligation to educate.

Therefore, the law must not protect only the individual right, but rather must explicitly enable the teacher the right to exercise professional judgement and decision making, including the real ability to make judgements between rights and responsibilities and/or to facilitate the temporary limitation of an individual right of the pupil within the framework of educational behaviours.

It is necessary to systemically, on the level of the law, enable the teacher or school the possibility to judge between various rights and responsibilities, that is, to weigh up and decide between rights and responsibilities, which also means the ability to temporarily limit an individual right of the pupil within the framework of educational behaviours. (Krek et al., 2011, 36–37).

There can be many reasons for the temporary revoking of the rights of the pupil: to protect the rights of other pupils, to protect the other rights of the pupil in question, or to implement moral education behaviours to the benefit of the pupil in question and/or the other pupils (Guttek, 1997). Due to the fact that pupils' rights are determined by the law and by regulations, and because – except perhaps in specific cases – it is not sensible to separately determine the limits of each individual right, a better general solution would be to add a section to the general systemic

law in the area of schooling that would define the right of the teacher/school to temporarily limit a particular right of a pupil. The same section could define the procedure of the conduct of the teacher/school in such cases. The state did not, however, implement this suggestion in law.

In period when the aforementioned *White Paper* was being compiled, an expert commission made up primarily of lawyers was in operation at the Ministry of Education. Its purpose was to „debureaucratise” or „deformalise” the operation of the school system by preparing a special law enabling schools to avoid acting according to the provisions of the *General Administrative Procedure Act* (General Administrative Procedure Act (GAPD), 1999) with regard to administrative procedures. The lawyers attempted to help school experts to prepare a law that would delineate when special procedural provisions were used in when the GAPD was used. Although the commission operated for one or two years, the special law never eventuated. Even if such a law had been prepared and subsequently passed, the „simplification” would have introduced special procedures and the new law would nonetheless have introduced additional legal regulations. Perhaps it would have solved some of the problems that school principals face in the operation of schools; it would not, however, have resolved the contradiction between the legal protection of rights and moral educa-

tion described above, as it would not have removed the protection of rights by legal means as such.

Even if an additional special procedural law did exist, it would still be possible for parents to come to school with a lawyer and, with the threat of the lawyer or with his/her actual engagement, interfere in the pedagogical process and moral education measures through formal procedural regulations.

4. Conclusion

We still believe that there is a need, on the level of law, to systemically enable schools to give their teachers the right to judge between the various rights and responsibilities of pupils, that is, to weigh up and decide be-

tween rights and responsibilities that are conceptually relative. This would also mean that the school could, for instance, temporarily limit the individual right of a pupil within the framework of moral education behaviours.

Even without these legal changes, however, a practical solution for schools is for each school to agree, within the institution, upon the norms and transparent rules according to which moral education is implemented, and for it to present these rules and reach agreement about them with the parents, thus enabling the school to execute its pedagogical work with the highest possible level of quality. If parents are familiar with the school's moral education plan, if they know what the rules are, and if the school enters into dialogue with parents and seeks their agreement, the school can reduce the probability that parents will

take recourse to formal legal means. It is impossible nonetheless to exclude the possibility that, in individual cases, conflict will arise and that parents will include a lawyer in an effort to protect the rights of their child (Heubert, 1999). In such cases, engaging a lawyer is also essential on the part of the school.

Bibliography

- Arum, R. (2003). *Judging School Discipline. The Crisis of Moral Authority* (pp. 1–323). Cambridge, Massachusetts: Harvard University Press.
- Cerar, M. (2011). Koliko prava potrebuje šolstvo? *Uprava*, 85–102. Retrieved from <http://www.fu.uni-lj.si/fileadmin/usr-files/MRJU/Uprava-Administration-March2011.pdf#page=85>

- Dunn, Joshua M.; West, M. R. (Ed.). (2009). *From Schoolhouse to Courthouse: The Judiciary's Role in American Education* (pp. 1–277). Washington, D.C.: The Brookings Institution.
- General Administrative Procedure Act, Pub. L. No. 80/99, 1. Oct. 1999 (1999). Slovenia: <http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO1603>.
- Goodson, I., & Hargreaves, A. (1996). *Teachers' professional lives. New prospects series; 3* (p. viii, 238p).
- Gutek, G. L. (1997). *Philosophical and Ideological Perspectives on Education* (2nd ed., p. 340). Allyn and Bacon.
- Heubert, J. P. (Ed. (1999). *Law and School Reform. Six Strategies for Promoting Educational Equity*. Yale University Press.
- Krek, J. (2014). Two Principles of Early Moral Education: A Condition for the Law, Reflection and Autonomy. *Studies in Philosophy and Education*. doi:10.1007/s11217-014-9421-8
- Krek, J., Globokar, R., Kalin, J., Kodelja, Z., Pribac, I., Šimenc, M., ... Saksida, I. (2011). Introduction. In J. Krek & M. Metljak (Eds.), *White Paper on Education in the Republic of Slovenia* (pp. 11–70). Ljubljana: Zavod RS za šolstvo. Retrieved from http://www.belaknjiga2011.si/pdf/white_paper_introduction_2011.pdf
- Wringer, C. (2006). *Moral Education: Beyond the Teaching of Right and Wrong*. Retrieved from http://books.google.com/books?hl=en&lr=&id=cHiwPKktA5UC&oi=fnd&pg=PP8&dq=Moral+Education:+Beyond+the+Teaching+of+Right+and+Wrong&ots=pkmsd_41jo&sig=skbu9EnFRta28UaqeCE5P-sPP5I
- Zakon o šolski inšpekciji – ZSolI, Pub. L. No. 29/96, 31. May 1996 (1996). Slovenia: <http://www.uradni-list.si/1/objava.jsp?urlid=2005114&stevilka=5039>.